No. 98-143

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DORIS KAHN,

Petitioner,

—v.—

SMITH BARNEY, HARRIS UPHAM & CO., INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of an appeal from the judgment of an intermediate state appellate court when discretionary review by the highest court of the state in which a decision could be had has not been sought?

2. Whether this Court has jurisdiction of an appeal from the judgment of an intermediate state appellate court, on remand from the highest court of the state, that seeks review of so-called "federal" issues that were finally resolved in 1995, should have been raised in a petition for a writ of certiorari in 1995, and are now untimely?

3. Whether this Court has jurisdiction of an appeal seeking review of a decision construing the unambiguous terms of an arbitration agreement in accordance with general state law principles of contract construction?

4. Assuming this Court reaches the issue, whether the parties agreed to allow pre-arbitration judicial determination of limitations defenses?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29 DISCLOSURE

Pursuant to Rule 14.1(b), the parties to the proceedings below include:

Doris Kahn, petitioner
Smith Barney, Harris Upham & Co. Incorporated (now known as Smith Barney Inc.), respondent
American Arbitration Association
Charlie Luckie Jr.
Barbara C. Luckie
Henry C. Satterfield, III
John S. Moshie
Jere A. Hughes

Pursuant to Rule 29.6, the following is a list of all parent and subsidiary corporations of respondent Smith Barney, Harris Upham & Co. Incorporated, which is now known as Smith Barney Inc.:

Travelers Group Inc.
- Salomon Smith Barney Holdings Inc.
  - Smith Barney Inc.
    - Robinson-Humphrey Insurance Services Inc.
      - Robinson-Humphrey Insurance Services of Alabama, Inc.
    - SBHU Life Agency of Arizona, Inc.
    - SBHU Life Agency of Indiana, Inc.
    - SBHU Life Agency of Ohio, Inc.
    - SBHU Life Agency of Oklahoma, Inc.
    - SBHU Life Agency of Texas, Inc.
    - SBHU Life Agency of Utah, Inc.

SBHU Life Insurance Agency of Massachusetts, Inc.
SBS Insurance Agency of Hawaii, Inc.
SBS Insurance Agency of Idaho, Inc.
SBS Insurance Agency of Maine, Inc.
SBS Insurance Agency of Montana, Inc.
SBS Insurance Agency of Nevada, Inc.
SBS Insurance Agency of Ohio, Inc.
SBS Insurance Agency of South Dakota, Inc.
SBS Insurance Agency of Wyoming, Inc.
SBS Insurance Brokerage Agency of Arkansas, Inc.
SBS Insurance Brokers of Kentucky, Inc.
SBS Insurance Brokers of New Hampshire, Inc.
SBS Insurance Brokers of North Dakota, Inc.
SBS Life Insurance Agency of Puerto Rico, Inc.
SLB Insurance Agency of Maryland, Inc.
Smith Barney Life Agency Inc.
Smith Barney (Hong Kong) Limited
Smith Barney (Netherlands) Inc.
Smith Barney International Incorporated
Smith Barney (Singapore) Pte Ltd.
Smith Barney Pacific Holdings, Inc.
Smith Barney (Singapore) Pte Ltd.
Smith Barney Pacific Holdings, Inc.
Smith Barney (Asia) Limited

Smith Barney Pacific Holdings, Inc.
Smith Barney Securities Pte Ltd.
Smith Barney Puerto Rico Inc.
The Robinson-Humphrey Company, LLC

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OPINIONS BELOW

The decision and order of the New York Appellate Division, First Department from which petitioner purportedly seeks certiorari is set forth in an opinion reported at *Smith Barney, Harris Upham & Co. v. Luckie,* 665 N.Y.S.2d 74 (App. Div., 1st Dep't Dec. 4, 1997). In that decision, the Appellate Division determined that petitioner's arbitral claims against respondent were barred by the limitations periods applicable to those claims. Reargument was denied by an order of the Appellate Division, First Department, dated April 16, 1998 that is not yet reported.

The Appellate Division's decision was issued after the case was remitted to it from the New York Court of Appeals pursuant to a 1995 New York Court of Appeals decision reported at 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308, *reargument denied*, 85 N.Y.2d 1033, 631 N.Y.S.2d 291, 655 N.E.2d 404 (1995), which is the decision that petitioner actually seeks to review here.[1] The Court of Appeals' decision held that, based on the terms of the parties' arbitration agreement, courts were empowered to resolve respondent's limitations defenses to petitioner's arbitral claims. The 1995 decision of the New York Court of Appeals followed a grant of leave to appeal from a

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[1] This 1995 decision applied to a companion case as well, entitled *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manhard.* By contrast with petitioner here, the losing party in that decision timely petitioned this Court for certiorari in 1995 making many of the same arguments petitioner raises here. That petition was denied by this Court. *See Manhard v. Merrill Lynch, Pierce, Fenner & Smith Inc,* 516 U.S. 811 (1995).

1993 decision of the Appellate Division, First Department, reported at 198 A.D.2d 87, 605 N.Y.S.2d 838 (App. Div., 1st Dep't 1993), which held that respondent's limitations defenses were subject to arbitral determination under the Federal Arbitration Act ("FAA"). The original opinion of the New York Supreme Court, New York County, dated October 14, 1992, was not officially reported. In that decision, the court held that petitioner's arbitral claims were timely.

JURISDICTION OF THIS COURT

The order and decision of the Appellate Division, First Department, as to which petitioner purports to seek a writ of certiorari, was entered on December 4, 1997 and petitioner's motion for reargument of that decision was denied on April 16, 1998. The Appellate Division's December 4, 1997 decision was issued after the case was remitted to the Appellate Division from the New York Court of Appeals, pursuant to its February 21, 1995 decision. The New York Court of Appeals' 1995 decision is the decree that actually forms the basis of the petition. As explained below, this Court lacks jurisdiction of this appeal for several reasons.

First, although petitioner purports to rely on 28 U.S.C. § 1257 as the basis for jurisdiction, this appeal is not sought from "the highest court . . . in which a decision could be had . . . ." *See* 28 U.S.C. § 1257(a). Specifically, petitioner seeks certiorari from an intermediate appellate court, without first having sought leave to appeal to the New York Court of Appeals.

Second, the petition is untimely. Petitioner seeks a writ of certiorari to review a 1995 New York Court of

Appeals decision that ultimately decided the only arguably "federal" issues in her petition. Since the 1995 remittitur from the New York Court of Appeals to the Appellate Division was for the limited purpose of resolving respondent's statute of limitations defenses to petitioner's claims, and the federal issues raised in this petition would not have been revisited by the New York Court of Appeals, petitioner should have sought a writ of certiorari in 1995.

Third, this appeal does not involve any substantial federal question. The only issue petitioner seeks to appeal to this Court is the New York Court of Appeals' 1995 construction of a contract in accordance with New York law and its conclusion that the agreement was unambiguous under New York law.

REASONS FOR DENYING PETITION

COUNTER-STATEMENT OF THE CASE

This is an action to permanently stay an arbitration commenced by petitioner against respondent on the grounds that her arbitral claims are barred by the applicable statutes of limitations. Petitioner commenced the arbitration that is the subject of this lawsuit in 1989, despite the fact that she removed her account, in which transactions that form the basis of her claims were made, from respondent in 1984. Respondent submits that courts are empowered to resolve this issue based on a New York choice of law clause that governs petitioner's arbitration agreement and its enforcement. New York arbitration law, a manifestly pro-arbitration statute upon which the FAA was actually modeled, *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967),

specifically allows pre-arbitration judicial resolution of limitations defenses. *See* N.Y. Civ. Prac. L. & R. 7502, 7503.

The procedural history of this case is long and complex, primarily due to the existence of several collateral proceedings commenced by petitioner in Florida state and federal courts. These proceedings had the effect of significantly prolonging the resolution of the issues squarely presented to the New York Court by respondent in 1989. The procedural history is set out in a variety of reported decisions in this matter, the most exhaustive of which is contained in *Kahn v. Smith Barney Shearson Inc.*, 115 F.3d 930, 931-32 (11th Cir.), *reh'g and sugg. for reh'g en banc denied*, 124 F.3d 930 (11th Cir. 1997). *See also Smith Barney, Harris, Upham & Co. v. Luckie*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308 (1995), *on remittitur*, 665 N.Y.S.2d 74 (App. Div., 1st Dep't 1997). In the interest of brevity, respondent will not reiterate the procedural history of this case here, but in so doing in no way accepts or admits petitioner's Statement of the Case.

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION DOES NOT SEEK REVIEW FROM THE HIGHEST COURT OF THE STATE OF NEW YORK IN WHICH A DECISION COULD BE HAD

The United States Code allows this Court to review by writ of certiorari final decisions rendered by "the highest court of a State in which a decision could be had . . . ." 28 U.S.C. § 1257. If the highest court of a State

provides for discretionary review of lower court orders, such review must be sought and denied before review of an intermediate appellate court decision may be sought in this Court. *See Banks v. California*, 395 U.S. 708, *reh'g denied*, 396 U.S. 869 (1969); *Stratton v. Stratton*, 239 U.S. 55 (1915).

Here, petitioner seeks review of a final decision of an intermediate New York appellate court. New York law specifically allows review of such decisions by the New York Court of Appeals with the permission of the Appellate Division or the Court of Appeals, upon motion made within 30 days after service of notice of entry of the Appellate Division order. *See* N.Y. Civ. Prac. L. & R. 5513, 5602. Petitioner elected not to seek such review.

Petitioner argues in her petition that such an appeal would have been "futile" because the Court of Appeals' earlier decision was the "law of the case", had subsequently been "reaffirmed" by the Court of Appeals, and would not have been addressed again by the Court of Appeals. The law, however, requires petitioner to at least seek such review and does not contain a "futility" exception. *See Gorman v. Washington University*, 316 U.S. 98, 100-01, *reh'g denied*, 316 U.S. 711 (1942); *Great Western Tel. Co. v. Burnham*, 162 U.S. 339 (1896); *McComb v. County Commissioners*, 91 U.S. 1 (1875); *see also* ROBERT C. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, KENNETH S. GELLER, SUPREME COURT PRACTICE, ch 3.11, at 112 (7th ed. 1993) ("Even though the appellate court considers itself bound on the second appeal by its decision on the first appeal, making the second appeal a mere formality, the second appeal is a prerequisite to Supreme Court review."). Accordingly,

this Court lacks jurisdiction to consider petitioner's proposed appeal.

II. THIS COURT LACKS JURISDICTION BECAUSE PETITIONER SEEKS REVIEW OF A "FINAL" DECISION RENDERED MORE THAN 3 YEARS AGO

Section 1257 allows review by writ of certiorari of "final" decisions of the highest state court in which review may be had. The "finality" requirement of § 1257 is satisfied in several categories of cases in which the decision on the federal issues is considered "final" for purposes of § 1257, even though additional substantive proceedings remain to be completed in the lower state courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

One of those categories in which a decision is deemed "final" and hence ripe for potential review by this Court is:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant causes of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In

> these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83.

The Court of Appeals' 1995 decision here falls within this category of "final" for purposes of § 1257. The "federal" issue, to the extent there is one, was resolved in the 1995 decision and would not be revisited by the Court of Appeals on a subsequent appeal under New York law. *See United Commodities-Greece v. Fidelity Int'l Bank*, 64 N.Y.2d 449, 454, 489 N.Y.S.2d 31, 32, 478 N.E.2d 172, 173, *rearg. denied*, 65 N.Y.2d 923, 493 N.Y.S.2d 1030, 483 N.E.2d 136 (1985).

Further, resolution of the "federal" issue in petitioner's favor (*i.e.*, a reversal by this Court) would have resulted in an end to the litigation, because it would have meant that respondent's limitations defenses were to be resolved by the arbitrators, not courts.

Finally, although respondent respectfully submits that no federal question is raised by the Court of Appeals' 1995 decision, if petitioner's FAA arguments here (and those she previously made before the New York Court of Appeals) are correct, then the Court of Appeals' decision did implicate federal policy and, according to petitioner, seriously eroded that policy. As such, the Court of Appeals' 1995 decision that respondent's limitations defenses were for courts, not arbitrators, to resolve was

"final" for purposes of 28 U.S.C. § 1257 and the instant petition. *Cox*, 420 U.S. at 482-83.

Since the Court of Appeals' 1995 decision is the "final" order sought to be reviewed herein, and petitioner moved for reargument of that decision in 1995, which was denied, the petition for certiorari is untimely. Under 28 U.S.C. § 2101(c), a petition for writ of certiorari must be sought within 90 days after entry of the judgment or decree sought to be reviewed. The 90 day time period under § 2101(c) may only be extended an additional 60 days. *Id.* This Court lacks jurisdiction to consider petitions that that are not timely filed. *See* Sup. Ct. R. 13.2.

The petition for a writ of certiorari here, filed more than three years after the final decision that petitioner seeks to reverse is untimely and, therefore, beyond the jurisdiction of this Court.

III. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

Even assuming petitioner can overcome the technical defects to her petition, she must face a more fundamental problem. In order for this Court to review the 1995 decision of the New York Court of Appeals, that decision must involve a substantial federal question. *See Benz v. New York State Thruway Auth.*, 369 U.S. 147 (1962); *Bunn v. State of North Carolina*, 336 U.S. 942, *reh'g denied*, 336 U.S. 971 (1949). It does not.

This Court has repeatedly stated that arbitration agreements simply are private contracts and ordinary state

law principles of contract construction apply to their interpretation. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995); *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 58-64 (1995) (applying state law contract construction principles); *Volt Info Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). It is similarly well-settled that this Court ordinarily does not sit to review questions of contract construction under state law, including the construction of arbitration agreements. *Volt*, 489 U.S. at 474; *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981).

The FAA is implicated in this analysis, but not *substantially* when the agreement is found to be unambiguous, like the agreement here. That is, once the terms of a contract are determined in accordance with ordinary state law principles of contract construction, and no ambiguity is found to exist, the FAA simply requires enforcement of that agreement according to its terms, unless such enforcement would directly conflict with overriding goals and policies of the FAA. *Volt*, 489 U.S. at 476-77. Since the FAA allows parties to arbitration agreements to control in large part the rules and procedures under which they will arbitrate, agreeing to arbitrate in accordance with state arbitration law that simply allows pre-arbitration judicial determination of limitations defenses does not undermine any goals and policies of the FAA. *See Mastrobuono*, 514 U.S. at 57; *Volt*, 489 U.S. at 479.

This Court's decision in *Mastrobuono* does not alter this analysis. In *Mastrobuono*, this Court did not address enforcement of an unambiguous agreement

allowing judicial determination of limitations defenses. The Court simply reviewed the agreement there to determine whether it precluded the arbitral award of punitive damages, in the absence of a definitive ruling by the highest court of the state whose law was to be applied. *Mastrobuono*, 514 U.S. at 58 ("the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages").

According to the Court, the agreement at issue in *Mastrobuono*, because it was ambiguous on the issue and was drafted by the securities firm, allowed punitive damages demands to be arbitrated. *Id.* at 58-64. Since the agreement here has been determined by the New York Court of Appeals to clearly require judicial resolution of limitations issues, this Court's construction of a different agreement concerning a different issue in *Mastrobuono* is inapposite.

This Court in *Mastrobuono* reviewed a decision of a federal court whose sole basis for subject matter jurisdiction was diversity. The Court distinguished its earlier decision in *Volt* on this ground and declared that it was simply reviewing "a federal court's interpretation of this contract" and could therefore review that interpretation *de novo*. *Mastrobuono*, 514 U.S. at 60 n.4.; *see id.* at 71-72 (Thomas, J., dissenting) ("This case amounts to nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois . . . . [T]he majority's interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed by state law.")

Here, the New York Court of Appeals construed the agreement in accordance with normal principles of contract construction and held that it unambiguously required judicial determination of limitations defenses prior to the arbitration. According to the Court of Appeals:

> Although the parties broadly agreed to arbitrate "any controversy" arising from the customer agreements, that clause -- like all other provisions in the contract -- was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning not only the agreement, but more critically, its enforcement. Accordingly, we conclude that under this agreement the parties agreed to refer questions of timeliness to the courts by incorporating New York law.

Luckie, 85 N.Y.2d at 202, 623 N.Y.S.2d at 805, 647 N.E.2d at 1313. This determination should not be reviewed by this Court. *Mastrobuono*, 514 U.S. at 60 n.4; *Volt*, 489 U.S. at 474. Since the Court of Appeals here found that the parties had clearly agreed to this procedure as a matter of state law contract construction, it found that enforcement of that agreement would not be inimical to the policies underlying the FAA; indeed, such enforcement was required by the FAA. *Id.* at 206, 623 N.Y.S.2d at 807, 647 N.E.2d at 1315.

Accordingly, respondent respectfully submits that the issue presented on this appeal, which is primarily one of contract construction under state law principles, does

not involve a substantial federal question and therefore does not invoke the jurisdiction of this Court.

IV. THE COURT OF APPEALS' CONSTRUCTION OF THE AGREEMENT WAS CORRECT

Even if this Court could review the 1995 New York Court of Appeals' determination that the agreement requires application of New York law allowing judicial determination of limitations defenses, the same result would obtain. Specifically, with respect to contractual choice of law clauses, the New York Court of Appeals has held, prior to its decision herein, that "the parties' manifested intentions to have an agreement governed by the law of a particular jurisdiction are honored . . . it is as though the law of the selected jurisdiction were *incorporated into the agreement by reference.*" *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 265 n.*, 401 N.Y.S.2d 176, 179-80 n.*, 372 N.E.2d 12, 15 n.* (1977) (emphasis added) (citing Restatement (Second) of Conflict of Laws § 187); *cf.* N.Y. Gen. Oblig. L. § 5-1401. Accordingly, the New York Court of Appeals here was correct in determining that "under this agreement the parties agreed to refer questions of timeliness to the courts by *incorporating* New York law." *Luckie*, 85 N.Y.2d. at 202, 623 N.Y.S.2d at 805, 647 N.E.2d at 1313 (emphasis added). Thus, under New York law, no ambiguity can be found to exist here.

Moreover, there is no reason to distinguish an arbitration provision from any other provision in a contract; as the New York Court of Appeals properly held, as a matter of New York law, the arbitration clause -- "*like all other provisions in the contract* -- was subject to the

parties' additional qualification that New York State law provides the basis of decision for questions concerning . . . its enforcement." *Id.* (emphasis added).

Similarly, the agreement must be construed as a whole -- there is no room here to interpret the choice of New York law to include only the "substantive" rules New York courts would apply *unrelated to arbitration*. Logically, a choice of law clause in an *arbitration* agreement must require application of New York *arbitration* law. *See Slatt v. Slatt*, 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 646, 477 N.E.2d 1099, 1100 (in construing contracts, "effect must be given to the [parties'] intent as indicated by the language used"), *rearg. denied*, 65 N.Y.2d 785, 492 N.Y.S.2d 1026, 482 N.E.2d 568 (1985). Otherwise, *the choice of law clause would have absolutely no meaning with respect to the enforcement of the arbitration provision*, which the agreement clearly requires. Indeed, such a determination would violate the settled principle of contract construction that a contract should be interpreted to give effect to *all* of its provisions. *Weiss v. Weiss*, 52 N.Y.2d 170, 174, 436 N.Y.S.2d 862, 864, 418 N.E.2d 377, 379 (1981). Accordingly, under the plain meaning of the agreement, the New York Court of Appeals correctly held that under New York law -- the law the New York Court of Appeals is charged with developing and interpreting -- New York arbitration law must govern.

In addition, because this case involves statutes of limitations, not punitive damages, this case does not implicate the concern expressed by the Court in *Mastrobuono* that the arbitration claimant unwittingly waived a right to relief that would be available under

"New York law" in a non-arbitral context. In fact, the Court found the *Mastrobuono* agreement ambiguous, in part, because New York law allowed punitive damages in court, but not in arbitration, and the agreement contained no such distinction on its face. *Mastrobuono*, 514 U.S. at 59-60.

Here, however, there is no such potential ambiguity -- New York law, like every other state's law, limits the time within which claims may be brought pursuant to express statutory limitations periods, *and these rules are applicable in both forums*. Thus, New York's statutory arbitration law (CPLR 7501-14), which affords arbitration respondents the option of having courts rather than arbitrators determine statute of limitations defenses, does not preclude arbitral determination of limitations defenses if a respondent chooses not to seek such a judicial determination, nor does it amount to a waiver of the right to seek a remedy that is otherwise available in Court without explicitly stating so; it merely authorizes judicial determination of these threshold procedural defenses.

Thus, under ordinary rules of contract interpretation, as applied by the New York Court of Appeals, no "ambiguity" arises; the New York statutory provision allowing judicial determination of limitations defenses must therefore apply to the enforcement of the arbitration agreement pursuant to the clear and unambiguous choice of law clause therein.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that petition should be denied.

Dated: New York, New York
August 21, 1998

Respectfully submitted,

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